Supreme Court, U. S.
FILED
MAY 24 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-904

BRUNSWICK CORPORATION,

Petitioner,

v.

PUEBLO BOWL-O-MAT, INC., BOWL-O-MAT PARAMUS OPERATIONS and HOLIDAY BOWL-O-MAT, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. pp. 1a-32a) is reported at 523 F. 2d 262 (3d Cir. 1975). The opinions of the United States District Court for the District of New Jersey (Pet. App. pp. 33a-60a) are reported at 364 F. Supp. 316 (D. N. J. 1973) and 389 F. Supp. 996 (D. N. J. 1974).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 29, 1975. On November 5, 1975, Mr. Justice Brennan extended petitioner's time for filing a petition for writ of certiorari to and including December 27, 1975 (No. A-421). The petition for writ of certiorari was filed on December 24, 1975 and was granted by this Court on February 23, 1976.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). Jurisdiction in the District Court was based on 15 U. S. C. §§ 15 and 26.

QUESTIONS PRESENTED.

1. Does the mere continued presence in certain local markets of retail establishments allegedly "acquired" by a "deep pocket" manufacturer in violation of Section 7 of the Clayton Act afford a basis for competing retailers to recover damages under Section 4 of the Clayton Act when there is no proof that the "acquisitions" resulted in any lessening of competition or monopoly in those markets?

2. Does not the "failing company" principle require dismissal of a treble-damage action based on alleged violations of Section 7 of the Clayton Act where the plaintiffs' entire damage theory is based on the premise that the "acquired" businesses would have failed and disappeared from the market had the defendant not kept them alive by making the challenged "acquisitions"?

STATUTES INVOLVED.

The first paragraph of Section 7 of the Clayton Act, 15 U. S. C. § 18, provides:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." [1]

Section 4 of the Clayton Act, 15 U. S. C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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1. The complaint (A10-A28) charged petitioner with violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, as well as with violations of Section 7 of the Clayton Act, 15 U. S. C. § 18. The Section 1 count was withdrawn prior to trial (A1548) and the jury rendered a verdict in petitioner's favor on the Section 2 count (A1543) and respondents did not appeal therefrom. Accordingly, Sections 1 and 2 of the Sherman Act are no longer statutes involved in this case.

STATEMENT.

In the words of the Court of Appeals, this is a case "of first impression nationally" (Pet. App. p. 6a) and explores "largely virgin antitrust territory" (Pet. App. p. 7a). The District Court entered in favor of respondents the first judgments for treble damages ever awarded by reason of claimed violations of Section 7 of the Clayton Act, and did this in the face of a jury verdict that petitioner had neither monopolized nor attempted to monopolize the relevant markets and in the absence of evidence that competition in these markets had been lessened or restrained.

In claiming injury and damage, respondents did not rely upon any claimed monopolization or lessening of competition. Rather, respondents' claims of injury and damage are based wholly upon the novel contention that the mere continued presence in the market of formerly failing businesses which were taken over and restored to viability by petitioner was illegal and that such allegedly illegal presence entitles respondents, who are competitors of the rescued businesses, to a recovery of damages. Respondents measure the "damages" to which they claim to be entitled by the estimated profits which they would have earned if the failing businesses had disappeared from the market, which respondents assert would have occurred if petitioner had not taken over the operation of such businesses. In essence, respondents' theory of injury and damage is based upon the fact that competition was not lessened but was preserved and continued, and the "damages" claimed by respondents are the normal business consequence of having competitors.

The Court of Appeals reversed the judgments and remanded the case for a new trial because of errors in the District Court's instructions to the jury, but the Court of

Appeals explicitly approved respondents' "unlawful presence" theory of injury and damage. That theory, which, in the words of the Court of Appeals, "obviously has far-reaching ramifications" (Pet. App. p. 19a), is now before this Court for review.

Also before this Court for review is an important question of law concerning the interaction between the principle which insulates the acquisition of a "failing company" from the prohibitions of Section 7 of the Clayton Act and the requirement of Section 4 of that Act that a treble-damage plaintiff must prove injury to its business or property by reason of something forbidden by the antitrust laws. Although the Court of Appeals recognized that, as an essential element of their attempted proof of injury and damage, respondents had the burden of proving that the businesses taken over by petitioner would have failed and disappeared from the market had petitioner not continued their operation, the court failed to recognize that such proof by respondents also would establish petitioner's "failing company" defense, requiring that the case be dismissed.

A. Background.

The significant antitrust issues involved in this case arise in the framework of the recreational bowling industry. Petitioner, Brunswick Corporation, had been a major manufacturer of bowling equipment.[2] Respondents (Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.) are three subsidiaries of Treadway Companies, Inc. which, through its subsidiaries, operates a number of bowling centers

2. Since 1963 there has been very little manufacture of bowling equipment (A1032-A1033, A1866).

throughout the United States (A56-A58).[3] Respondents operate bowling centers in Pueblo, Colorado; in Paramus, New Jersey; and near Poughkeepsie, New York.

In the past twenty years, the industry experienced a period of marked prosperity (the latter 1950's), followed by a period of serious decline (the 1960's), and, more recently, by a period of general improvement (the 1970's) (A61-A62, A70-A71, A357-A358, A548-A551, A650-A652, A1187).

The industry was in its infancy until the mid-1950's when the introduction of automatic pinsetting machines revolutionized the industry and bowling increased in popularity. With the introduction of this modernized equipment, local bowling centers thrived and new bowling centers sprang up everywhere. During this period of growth petitioner sold large quantities of automatic pinsetters and bowling lanes to operators of local bowling centers (A548-A550, A1025-A1032).[4]

However, because the initial outfitting of a bowling center involves a substantial capital investment, petitioner was not able to sell its pinsetters and lanes for cash, but instead accepted installment paper pursuant to which the bowling center operator made an initial down payment in cash and agreed to pay the major portion of the purchase

3. This action was instituted by Treadway Companies, Inc. (formerly known as "National Bowl-O-Mat Corporation") and ten of its wholly-owned subsidiaries. However, respondents were the only plaintiffs in whose favor a judgment was rendered (A1546-A1549, A1560-A1561).

4. From 1956 through 1960, petitioner's sales of new pinsetters were as follows (A881, A1866):

Year	*Quantity*
1956	1,890
1957	7,041
1958	10,528
1959	12,876
1960	15,232

price in installments over a period of years. Under the conditional sales agreements entered into by petitioner and bowling center operators, petitioner retained a security interest in the equipment which it sold on the installment plan. While petitioner had no difficulty collecting the installment payments during the boom period of the 1950's, the early 1960's brought about a complete reversal. The bowling industry went into a sharp decline and petitioner ran into a nightmare of collection problems and hopeless defaults (A1028-A1039).[5] The Court of Appeals, in its opinion below, accurately summarizes the situation as follows (Pet. App. pp. 7a-8a):

5. From 1961 through 1972, petitioner's sales of new pinsetters were as follows (A881-A882, A1866):

Year	*Quantity*
1961	16,288
1962	7,518
1963	2,978
1964	1,441
1965	659
1966	244
1967	295
1968	112
1969	118
1970	173
1971	72
1972	1,048

During that same period, petitioner's repossessions of pinsetters were as follows (A882, A1037, A1866):

Year	*Quantity*
1961	300
1962	1,462
1963	3,354
1964	4,592
1965	5,996
1966	3,658
1967	1,688
1968	716
1969	783
1970	290
1971	116
1972	50

"Simultaneously with the decline in the industry there occurred a collection problem. Defaults on equipment loans became commonplace. Numerous bowling center proprietors were in such hopeless financial straits that it became clear that there was no reasonable prospect of payment. Exercising its chattel security rights, Brunswick made numerous repossessions, and attempted to dispose of the repossessed equipment at discount prices. Such sales, however, did not keep pace with repossessions. Brunswick's efforts to lease repossessed lanes to new independent proprietors proved unsuccessful. Over the years Brunswick had borrowed close to $300 million in order to finance the manufacture and sale of bowling equipment. By late 1964 its receivables were in excess of $400 million of which more than $100 million dollars were over 90 days delinquent. Brunswick was clearly in serious financial difficulty.

"In an effort to reverse its deteriorating condition, Brunswick's management decided on a plan. In those cases in which attempts to collect receivables failed, it would repossess the equipment and attempt to sell it in place to third parties. If no sale could be effected Brunswick would then consider operating the failing centers itself if there appeared to be any reasonable prospect that a positive cash flow would result.

"In January 1965 Brunswick formed a Bowling Center Operations Division (BCOD) charged with the responsibility of evaluating centers and operating those which could produce a positive cash flow. This development was disclosed by Brunswick's president to a meeting of the Bowling Proprietors Association, a retail level trade group, in 1965.

"Between 1965 and 1972 BCOD evaluated over 600 defaulting centers for possible operation, commenced operating 222 of these, disposed of 11 to third parties, and closed 43 which proved unable to develop a positive cash flow. The highest number operated by Brunswick at any one time was 169. The largest number of centers taken over by Brunswick for operation in any year was 124 in 1965. Of these, centers in three areas are the subject of this appeal. They are Dutchess Lanes in Poughkeepsie, New York, Belmont Lanes in Pueblo, Colorado, and Fair Lawn Lanes, Interstate Lanes, Ten-Pin-on-the-Mall and Lodi Lanes in or near Paramus, New Jersey.

"In each of the local retail market areas a Treadway subsidiary operated a bowling center competing for retail customers with the bowling centers taken over by Brunswick. . . ."[6]

B. Poughkeepsie, New York.

In 1965, petitioner repossessed the pinsetters and lanes at a defaulting 26-lane bowling center (Dutchess Lanes) in Poughkeepsie, New York, leased the premises and began operating that center. Under petitioner's operation, Dutchess Lanes failed to develop a positive cash flow and petitioner discontinued the operation in 1969, removing its bowling equipment. At the time petitioner commenced operating Dutchess Lanes in 1965, there were five other bowling centers in the Poughkeepsie area including a 36-lane center operated by respondent Holiday Bowl-O-Mat,

6. For record support for the Court of Appeals' summarization of the situation, see A1031-A1046, A1056, A1099, A1363-A1370, A1384-A1386, A1394-A1399, A1881 and A1884.

In 1972, there were a total of 8,818 bowling centers in the United States of which petitioner operated 168 (A1096), less than 2% of the total.

Inc. Each of the five centers continued to operate throughout the period of petitioner's operation of Dutchess Lanes and each was still operating at the time of trial (A185-A189, A201, A395-A396, A428-A429, A432-A433, A1078-A1079, A1125-A1127, A1609).

The Poughkeepsie bowling market was highly competitive prior to petitioner's operation of Dutchess Lanes (A197, A1610), and this competition did not lessen during the period of petitioner's operation. Indeed, to the contrary, two of the other bowling centers in the Poughkeepsie market expanded their facilities during the period when petitioner was operating Dutchess Lanes (A432-A433, A1126). Adding new lanes increased competition for the local bowlers' patronage, as respondents' president testified (A432-A433); he further testified that petitioner's closing of Dutchess Lanes in 1969 caused "lessening" of competition (A436).

Respondents made no attempt to particularize or measure any loss of business to Holiday Bowl-O-Mat resulting from the manner in which petitioner operated Dutchess Lanes or to show how Holiday Bowl-O-Mat might have been affected had Dutchess Lanes been operated by someone other than petitioner. Rather, respondents directed their damage claim to the propositions that Holiday Bowl-O-Mat had been harmed by petitioner's "just keeping it [Dutchess Lanes] alive" (A433) and that Holiday Bowl-O-Mat was entitled to have achieved annual earnings throughout the 1965-69 period equal to those it ultimately enjoyed after there was "a lessening of the competition in the area with Dutchess closed" (A436). Holiday Bowl-O-Mat's claimed measure of "damage" was the estimated profit from additional bowling patronage that would have come its way if Dutchess Lanes had been closed in 1965 rather than four years later (A396-A399).

C. Pueblo, Colorado.

Petitioner repossessed the bowling equipment at a defaulting 24-lane bowling center in Pueblo, Colorado (Belmont Lanes), leased the premises and began operating that center in 1965. There were four bowling centers in Pueblo, Colorado operated by others at the time, including a 40-lane center operated by respondent Pueblo Bowl-O-Mat, Inc. Each of these centers continued to operate throughout the period involved in this case (A122, A165, A446, A502-A503, A1078).

Like its sister corporation in the Poughkeepsie area, Pueblo Bowl-O-Mat took the position that petitioner had wronged it by "keeping alive the center which we think should not be in business" (A377) and that petitioner had injured Pueblo Bowl-O-Mat by "taking over Belmont Lanes and operating it directly competitively to our center" (A366). The claimed "damages" consisted of the estimated additional income Pueblo Bowl-O-Mat would have enjoyed had Belmont Lanes been closed in 1965 instead of being continued by petitioner (A377-A378, A511-A513).

D. Paramus, New Jersey.

In 1965, petitioner was also confronted by defaults in equipment payments by the bankrupt American International Bowling Corporation ("AIBC") and its subsidiaries (each of which operated a local bowling center). AIBC and its subsidiaries owed in excess of $10 million to petitioner and petitioner purchased the capital stock of a number of AIBC subsidiaries at the AIBC bankruptcy sale. Included among the AIBC subsidiaries whose stock was purchased by petitioner were two companies operating bowling centers in the general vicinity of Paramus, New Jersey—Fair Lawn Lanes in Fair Lawn, New Jersey and Interstate Lanes in Ramsey, New Jersey. Petitioner began

operating these two bowling centers in March 1965 (A249-A252, A1287-A1288, A1325).

In September 1969, petitioner repossessed the bowling equipment at Ten-Pin-on-the-Mall in Paramus, New Jersey, obtained a lease of the premises, and took over and continued the operations of that bowling center. Beginning in 1970, petitioner operated Lodi Lanes in Lodi, New Jersey under a lease of the equipment and premises which expired in 1973 (A1128, A1850-A1863).[7]

Respondent Bowl-O-Mat Paramus Operations is the operator of a bowling center in Paramus, New Jersey which respondents' witnesses said was in competition with all four of these centers—Fair Lawn, Interstate, Ten-Pin and Lodi—as well as with a number of other bowling centers in the northern New Jersey area (A209-A214, A1626).[8] All of these centers continued to operate throughout the period involved in this case.

As with respect to Poughkeepsie and Pueblo, no attempt was made by respondents to prove damages in Paramus resulting from the manner in which petitioner operated Fair Lawn, Interstate, Ten-Pin and Lodi, and no

7. Because the lessors were two individuals, and not a corporation, petitioner's operation of Lodi Lanes is irrelevant to respondents' claims under Section 7 of the Clayton Act which, by its express terms, applies only to acquisitions by one corporation of stock or assets "of another corporation." Section 7 does not reach an acquisition of partnership assets. **United States v. American Building Maintenance Industries,** 422 U. S. 271, 279 (1975).

8. Respondents' president asserted that there were eleven bowling centers (including Fair Lawn, Interstate, Ten-Pin and Lodi) with a total of 384 lanes in the competitive market in which Bowl-O-Mat Paramus Operations operated (A212-A214, A225-A226, A235, A1626). This assertion was disputed by one of petitioner's witnesses who demonstrated that Interstate is located approximately 12 miles from Bowl-O-Mat Paramus Operations and that there were 36 bowling centers (943 lanes) within a 12 mile radius of Bowl-O-Mat Paramus Operations. Twenty-two of the centers (580 lanes) were within five miles of Bowl-O-Mat Paramus Operations (A1279-A1287).

evidence was offered as to how Bowl-O-Mat Paramus Operations might have fared had the four centers, or any of them, been operated by someone other than petitioner. As they had done in connection with the other markets involved in this case, respondents' witnesses took the position that petitioner's sin was in taking over the operation of the centers and keeping them alive and that Bowl-O-Mat Paramus Operations was entitled to recover as "damages" the estimated additional income it would have obtained had the centers operated by petitioner been closed (A399-A404, A571).

E. The Trial.

Claiming that petitioner's taking over and continuing the operation of bowling centers violated Section 2 of the Sherman Act ("monopolization" and "attempt to monopolize") and Section 7 of the Clayton Act ("acquisitions" whose effect "may be substantially to lessen competition, or to tend to create a monopoly"), respondents (and their parent and sister corporations) brought suit against petitioner seeking money damages under Section 4 of the Clayton Act and equitable relief under Section 16 of the Clayton Act.[9] A lengthy jury trial ensued in the United States District Court for the District of New Jersey.

There was no evidence whatever at the trial that competition among bowling centers in the Poughkeepsie, Pueblo and Paramus areas was lessened in any degree (let alone "substantially") by reason of petitioner's taking over

9. The lawsuit filed by respondents is in sharp contrast with the action of the Federal Trade Commission, which commenced an investigation into petitioner's alleged antitrust violations in "acquiring" and operating bowling centers and concluded its investigation in 1968 with a decision to take no action. (The Federal Trade Commission decision is referred to in correspondence attached as Exhibits B, C and D to the August 28, 1973 affidavit of Malcolm A. Hoffmann, Esquire, submitted in support of respondents' application for attorneys' fees.)

or operating any bowling center, nor was there any showing that any of the "acquired" [10] centers achieved a greater share of the bowling patronage in its market after petitioner began operating it than the center had obtained under its prior operator. As the Court of Appeals pointed out, petitioner's entry into the picture "only acted as a substitution of competitors" (Pet. App. p. 22a).

Throughout the trial respondents took the position that petitioner had violated the law in taking over the centers and keeping them in business, that respondents (as competitors of the centers) were "injured" by the mere continued presence in the markets of the centers operated by petitioner, and that, therefore, respondents were entitled to recover as "damages" the difference between what their bowling centers actually earned and what those centers would have earned had the "acquired" centers disappeared from the market (A366-A367, A377-A404, A511-A513, A565-A566, A571, A586, A852-855).

10. Quotation marks have been placed around the words "acquire", "acquired", "acquiring" and "acquisition" wherever they appear in this brief with reference to petitioner's taking over the operation of bowling centers. Petitioner's position is that there were no "acquisitions" in this case within the meaning of Section 7 of the Clayton Act.

The legislative history of the 1950 amendments to Section 7 evidences a Congressional intention that Section 7 should not apply to purchases made at bankruptcy sales. H. R. Rep. No. 1191, 81st Cong., 1st Sess. at p. 6 (1949) and S. Rep. No. 1775, 81st Cong., 2nd Sess. at p. 7 (1950).

When petitioner reluctantly exercised its rights as a secured creditor to repossess bowling equipment from a bowling center it did not thereby obtain a bowling center or a business, but only fungible items of equipment which were in great oversupply in the market and in petitioner's warehouses. Calling such repossessions "acquisitions" does not make them the kind of transactions with which Congress was concerned when it enacted Section 7 in 1914 or when it amended the Section in 1950. *Cf.* **Brown Shoe Co. v. United States**, 370 U. S. 294, 311-323 (1962). There is no reason to believe that Section 7 was intended to limit the security rights of vendors of chattels.

No attempt was made by respondents to dispute petitioner's evidence that it never had repossessed the equipment of a bowling center which was not hopelessly insolvent and had no reasonable prospect of ever being able to pay its debts. Indeed, respondents' entire damage theory is predicated upon the assumption that, but for petitioner, the centers taken over and operated by petitioner would have failed and disappeared from the market. Respondents have so stated in this Court.[11]

At the conclusion of the trial, the jury returned verdicts (A1543) finding **for**• petitioner on the claims of monopolization and attempted monopolization under Section 2 of the Sherman Act, and **against** petitioner on the claims under Section 7 of the Clayton Act. The jury awarded damages to respondents in amounts equal to the additional profits that respondents' witnesses estimated respondents' bowling centers would have earned over the years if each of the centers taken over and operated by petitioner had gone out of existence on the day petitioner commenced operating it (A1737).

F. The Court of Appeals Decision.

After its motion for judgments notwithstanding the verdict and, in the alternative, for a new trial (A1550-A1559) was denied (Pet. App. pp. 33a-49a), petitioner appealed to the United States Court of Appeals for the Third Circuit (A1562).[12] In an opinion with far-ranging implications, the

11. Petition for certiorari in **Treadway Companies, Inc. et al. v. Brunswick Corporation** (October Term 1975, No. 75-770), pp. 13-14.

• Wherever boldface is used in this brief, the emphasis is ours.

12. Petitioner's initial appeal was dismissed (after oral argument on the merits) as being from a non-final order (A1563-A1566). The District Court then certified its order under Rule 54(b) of the Federal Rules of Civil Procedure (A1567-A1570) and petitioner again appealed (A1571). Subsequently the District Court entered

Court of Appeals reversed and ordered a new trial, holding that the case had been submitted to the jury on erroneous instructions as to both liability and damages, but refused to order the entry of judgment for petitioner as a matter of law (Pet. App. pp. 1a-32a).[13]

The Court of Appeals held that a properly instructed jury could have found that petitioner had violated Section 7 of the Clayton Act (Pet. App. pp. 10a-14a). The court asserted that "in some industries the acquisition of a competitor by a deep pocket parent can have sufficient potential to harm horizontal competitors so as to violate § 7" and that "there was sufficient evidence of such potential here to submit the case to the jury on the issue of effect on competitors" (Pet. App. p. 14a).[14]

12. (Cont'd.)
a final judgment on the equity side of the case (Pet. App. pp. 50a-60a) and petitioner appealed from that as well (A1572).

Respondents did not appeal from the judgments against them on their Section 2 claims.

13. The Court of Appeals held that the charge to the jury on the Section 7 violation issue was "virtually a directed verdict" against petitioner (Pet. App. p. 21a) and had improperly emphasized the market shares of the centers taken over and operated by petitioner to the exclusion of other factors which the jury should have considered (Pet. App. pp. 21a-22a). The court further held that the charge to the jury on the question of damages had effectively relieved respondents of the burden of proving injury to their business or property proximately related to the alleged Section 7 violations (Pet. App. p. 26a) and had improperly instructed the jury to find damages within the range claimed by respondents (Pet. App. p. 27a).

The decision of the Court of Appeals to order a new trial rather than to affirm the judgments in respondents' favor was the subject of the petition for certiorari in **Treadway Companies, Inc. et al. v. Brunswick Corporation,** October Term 1975, No. 75-770.

14. Petitioner continues to believe that this holding of the Court of Appeals was erroneous. Petitioner does not argue this contention in the present brief, however, because it believes it to be irrelevant to both of the questions which this Court has concluded to review.

Whether or not petitioner had a "deep pocket" and whether or not by reason thereof its "acquisition" and operation of bowling

The Court of Appeals also held that respondents could get their case to a properly instructed jury without showing any lessening of competition. According to the Court of Appeals, "a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition" (Pet. App. p. 19a).

Additionally, the Court of Appeals held that respondents could get their case to a jury even though the entire basis for their claims of injury and damage was the premise that, had it not been for petitioner taking over and operating the bowling centers involved in this case, those centers would have failed and disappeared from the market (Pet. App. pp. 25a-27a), a premise which appears to fly in the teeth of the doctrine which insulates the acquisition of "failing companies" from the proscriptions of Section 7.

The Court of Appeals was of the opinion, however, that respondents had failed to prove that, but for petitioner's taking over and operating the bowling centers

14. (Cont'd.)
centers had a potential to harm horizontal competitors are questions relevant only to the issue of whether or not Section 7 was violated, and not to the questions presented to this Court.

The first question presented in this case assumes, *arguendo,* that a Section 7 violation might be found. The question is whether, absent a substantial lessening of competition or monopoly, the mere continued presence of the "acquired" centers in the marketplace can afford a basis for competing centers to recover damages under Section 4 of the Clayton Act.

The second question presented to this Court involves the interaction between the "failing company" doctrine and the requirement of Section 4 that a treble-damage plaintiff prove injury to its business or property by reason of something forbidden by the antitrust laws. This too is wholly unrelated to the question of whether petitioner's "acquisitions" had a potential to harm horizontal competitors.

in question, the centers would have failed and gone out of business. Although this meant that respondents had failed to prove a fact which was an essential element of their only attempted proof of injury and damages, the Court of Appeals did not order judgment for petitioner but instead remanded the case to the District Court for a new trial.

The Court of Appeals observed that petitioner had the burden of proving its defense that the centers taken over and operated by it were "failing companies" (Pet. App. pp. 26a-27a). The Court failed to recognize, however, the inescapable conclusion that if respondents should prove, in a new trial, that the bowling centers in question would have failed and disappeared had petitioner not taken over their operation, respondents could not avoid having proved petitioner's "failing company" defense, whereas if respondents should not be able to make such proof they would have failed to prove any injury or damage. In either event dismissal of the case would be required. Under the rulings of the Court of Appeals, a new trial would appear to be an exercise in futility.

SUMMARY OF ARGUMENT.

1. Section 4 of the Clayton Act permits treble damage recovery by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Typically, that Section is invoked in private actions brought to recover damages for alleged violations of the provisions of the antitrust laws which deal with **actual** restraints of trade, *i.e.* Sections 1 and 2 of the Sherman Act.[15]

Unlike Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act deals with incipiencies only. Section 7 prohibits acquisitions whose effect "**may be** substantially to lessen competition, or to **tend** to create a monopoly." Since Section 7 proscribes acquisitions which "may" lead to specified anticompetitive consequences while Section 4 provides for recovery only by persons who in fact have been injured by antitrust violations, there appears to be a fundamental incongruity in basing a damage action under Section 4 on a Section 7 violation. On this basis, a number of courts have held that a private plaintiff can never predicate a Section 4 claim for money damages on a violation of Section 7. On the other hand, a number of other courts, led by the Second Circuit in **Gottesman v. General Motors Corporation,** 414 F. 2d 956 (2d Cir. 1969), have held that there can be private damage recovery under Section 4 if the threatened restraint of trade which renders an acquisition violative of Section 7 ripens into reality and causes injury.

If a private action for damages based on a violation of Section 7 is to be allowed, it would seem to be axiomatic

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15. There was no Sherman Act violation in the instant case, respondents having withdrawn their Section 1 claim (A1548) and the jury having found against them on their Section 2 claim (A1543).

that the "injury" to the private plaintiff that must be shown is injury flowing from an actual lessening of competition or a monopoly, the evils which Section 7 was designed to prevent. Numerous Section 7 cases have recognized this principle. In the instant case, however, the Court of Appeals for the Third Circuit rejected this concept and held that a competitor of a company allegedly acquired in violation of Section 7 may recover damages under Section 4 merely by showing "injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition." This holding is patently erroneous. Section 4 of the Clayton Act was not enacted for the purpose of enabling business enterprises to obtain windfall verdicts but to compensate those who can demonstrate that they have been injured in their business or property by reason of anticompetitive activities forbidden by the antitrust laws. Whatever its potentiality may be, an acquisition that has not, in fact, resulted in a substantial lessening of competition or a monopoly generates no anticompetitive consequences. The mere continued presence in the marketplace of a business enterprise allegedly "acquired" in violation of Section 7 cannot give rise to compensable "damages" under the antitrust laws.

2. Ever since **International Shoe Co. v. FTC**, 280 U. S. 291 (1930), it has been firmly established that an acquisition of a business enterprise is immune from challenge under Section 7 of the Clayton Act where the financial condition and resources of the acquired company are so dire that it faces the grave possibility of business failure and there are no prospective purchasers other than the acquiring company. This "failing company" doctrine stems from a policy determination, made by both the Congress and this Court, that it is more important to preserve competition by assuring the continued existence of a competitive entity than it is to eliminate the possible anticompetitive effects of the acquisition. In the instant case, respondents' entire theory of injury and damage was based on the premise that, had petitioner not taken over the "acquired" bowling centers and continued their operations, they would have gone out of business and disappeared from the marketplace. But if the bowling centers would have failed and gone out of business had it not been for petitioner's keeping them open and viable as competitors, the centers necessarily were "failing companies" and, therefore, their "acquisition" did not violate Section 7. Contrariwise, if the bowling centers would not have gone out of business, the necessary premise for respondents' only claims of injury and damage is missing. In either event, respondents' case must fail and petitioner is entitled to judgment as a matter of law.

Argument.

I.

TREBLE DAMAGE RECOVERY MAY NOT BE HAD FOR LOSS OF PROFITS ATTRIBUTED TO THE MERE CONTINUED PRESENCE IN THE MARKET OF A COMPETITOR ALLEGEDLY ACQUIRED IN VIOLATION OF SECTION 7 OF THE CLAYTON ACT WHEN THERE IS NO PROOF THAT THE "ACQUISITION" RESULTED IN A SUBSTANTIAL LESSENING OF COMPETITION OR MONOPOLY.

As the Court of Appeals put it, "the antitrust questions arise because of the unique interaction among the Clayton Act § 7 . . . and the private remedy provisions of § 4 and § 16 of the same act" (Pet. App. p. 6a).

Section 4 of the Clayton Act, 15 U. S. C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4 typically is invoked in private actions brought to recover damages for alleged violations of Sections 1 and 2 of the Sherman Act. Since Section 1 of the Sherman Act, 15 U. S. C. § 1, prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce", one who has been injured in his business or property by reason of such a restraint has a claim for damages under Section 4 of the Clayton Act. Similarly, since Section 2 of the Sherman Act makes it unlawful for anyone to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce," Section 4 of the Clayton Act permits one who has been injured by a monopolization or attempted monopolization to sue for the damages he has sustained.

Section 7 of the Clayton Act, 15 U. S. C. § 18, stands on a different footing. As the Court of Appeals recognized, Section 7 is "a statutory prohibition aimed neither at existing conspiracies nor restraints, nor at existing or attempted monopolizations, but at incipient tendencies" (Pet. App. p. 6a). Section 7 provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or . . . assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

This Court has pointed out on a number of occasions that the purpose of Section 7 is preventive in nature. Section 7 "was intended to arrest the anticompetitive effects of market power in their incipiency";[16] "to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil."[17] Courts were given power "to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act."[18] Congress' "concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition."[19] The design of

16. **FTC v. Procter & Gamble Co.**, 386 U. S. 568, 577 (1967).

17. **United States v. E. I. duPont de Nemours & Co.**, 353 U. S. 586, 597 (1957).

18. **Brown Shoe Co. v. United States**, 370 U. S. 294, 323 n. 39 (1962) (quoting from the legislative history).

19. *Id.* at 323.

Section 7 was to stop the harm before it occurred. "Mergers with a probable anticompetitive effect were to be proscribed by this Act." [20] "The test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints." [21]

Because Section 7 proscribes acquisitions which "may" lead to specified anticompetitive consequences while Section 4 permits recovery by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," there appears to be a fundamental incongruity in basing a Section 4 action on a Section 7 violation. Since "a reasonable probability" may or may not ripen into a future actuality, how can it cause injury before it ripens? How can one "be injured in his business or property by reason of" a restraint of trade that is only threatened or potential? Unable to find a satisfactory answer to these questions, a number of district courts held in the 1960's that a private plaintiff could not predicate a Section 4 claim for money damages on a violation of Section 7. See **Gottesman v. General Motors Corporation,** 221 F. Supp. 488, 493 (S. D. N. Y. 1963); **Bailey's Bakery, Ltd. v. Continental Baking Co.,** 235 F. Supp. 705, 716-717 (D. Hawaii 1964), *aff'd per curiam,* 401 F. 2d 182 (9th Cir. 1968), *cert. denied,* 393 U. S. 1086 (1969); **Highland Supply Corp. v. Reynolds Metals Co.,** 245 F. Supp. 510, 512-514 (E. D. Mo. 1965); **Isidor Weinstein Investment Co. v. Hearst Corp.,** 303 F. Supp. 646, 650 (N. D. Cal. 1969).

In **Gottesman v. General Motors Corporation,** 414 F. 2d 956, 961 (2d Cir. 1969), the Court of Appeals for the Second Circuit took a different approach. In that case, a

20. *Ibid.*

21. **United States v. E. I. duPont de Nemours & Co.,** 353 U. S. at 607.

General Motors stockholder brought a derivative action against duPont as an aftermath of the Government case in which this Court had held that duPont's acquisition of a substantial stock ownership in General Motors constituted a "potential" restraint of trade. **United States v. E. I. duPont de Nemours & Co.,** 353 U. S. 586 (1957). The stockholder claimed that, because of the stock ownership, duPont had caused General Motors to purchase paints and fabrics from duPont at higher prices than could have been obtained from other sources. In a pretrial ruling, the district court dismissed the claim, holding that there could be no private damage recovery for a Section 7 violation (221 F. Supp. 488), but the court of appeals reversed and remanded, saying (414 F. 2d at 961):

> ". . . The basis of the pre-trial ruling was that a section 7 violation can cause no damage because it establishes only that harm was threatened, not that it occurred. But if the threat ripens into reality we do not see why there can never be a private cause of action for damages. If section 7 is designed to prevent acquisitions that 'may' or 'tend to' cause specified harm, such an acquisition may either itself directly bring about the harm or make possible acts that do. We do not say that a section 7 violation must, or even probably will, have that result; but that it may and that plaintiffs should have a chance to prove injury 'by reason of' the violation are persuasive propositions. . . ." [22]

Subsequent to the **Gottesman** decision, a number of district courts have expressed agreement with this con-

22. On remand in **Gottesman,** the district court held that the plaintiff failed to sustain her burden of proving damages resulting from the Section 7 violation, and the court of appeals affirmed. **Gottesman v. General Motors Corporation,** 310 F. Supp. 1257 (S. D. N. Y. 1970), *aff'd* 463 F. 2d 1205 (2d Cir.), *cert. denied* 403 U. S. 911 (1971).

clusion.[23] So have the courts of appeals for the Fifth and Eighth Circuits. **Dailey v. Quality School Plan, Inc.**, 380 F. 2d 484, 488 (5th Cir. 1967),[24] **Carlson Companies, Inc. v. Sperry and Hutchinson Co.**, 507 F. 2d 959, 961 (8th Cir. 1974).[25]

In the instant case, the Court of Appeals for the Third Circuit went far beyond the **Gottesman** rule and, in effect, rejected the cornerstone of the **Gottesman** reasoning by holding that the mere continued presence in the market of a company allegedly acquired in violation of Section 7 may provide a basis for a competitor to recover damages under Section 4 in spite of the absence of proof that the

23. **Metropolitan Liquor Co. v. Heublein, Inc.**, 305 F. Supp. 946, 948 (E. D. Wis. 1969); **Western Geophysical Co. v. Bolt Assoc., Inc.**, 305 F. Supp. 1251, 1254 (D. Conn. 1969); **Kirihara v. Bendix Corp.**, 306 F. Supp. 72, 88 (D. Hawaii 1969); **Isidor Weinstein Investment Co. v. Hearst Corp.**, 310 F. Supp. 390, 391 (N. D. Cal. 1970); **Metric Hosiery Co. v. Spartans Industries, Inc.**, 50 F. R. D. 50, 51 (S. D. N. Y. 1970); **Champion Spark Plug Co. v. Ransburg Electro-Coating Corp.**, 1971 Trade Cases ¶ 73,553 (N. D. Ohio 1971); **Calnetics Corp. v. Volkswagen of America, Inc.**, 348 F. Supp. 606, 616 (C. D. Cal. 1972), *rev'd on other grounds* 1976 Trade Cases ¶ 60,757 (9th Cir. 1976); **Peltier v. Humble Oil & Refining Co.**, 1973 Trade Cases ¶ 74,278 (D. Ore. 1972); **Zenith Vinyl Fabrics Corp. v. Ford Motor Co.**, 357 F. Supp. 133, 136 (E. D. Mich. 1973); **Heatransfer Corp. v. Volkswagenwerk A. G.**, 1975 Trade Cases ¶ 60,307 (S. D. Texas 1974), *appeal pending;* **Southern Concrete Co. v. United States Steel Corp.**, 394 F. Supp. 362, 373 (N. D. Ga. 1975).

24. On remand in the **Dailey** case, a jury found for the defendant and the court of appeals affirmed. **Dailey v. Quality School Plan, Inc.**, 427 F. 2d 1080 (5th Cir. 1970).

25. See also **Martin-Trigona v. Federal Reserve Board**, 509 F. 2d 363, 366 n. 12 (D. C. Cir. 1975) (dictum) and **Helix Milling Co. v. Terminal Flour Mills Co.**, 523 F. 2d 1317, 1323 (9th Cir. 1975) (dictum).

In **Calnetics Corp. v. Volkswagen of America, Inc.**, 1976 Trade Cases ¶ 60,757 (9th Cir. 1976), the Court of Appeals for the Ninth Circuit simply assumed that a private plaintiff could predicate a Section 4 claim for money damages on a Section 7 violation.

anticompetitive effects supposedly threatened by the acquisition had ripened into reality.

It would seem to be axiomatic that if a private action for damages for violation of Section 7 is to be allowed,[26] the "injury" that must be shown in order to recover is injury flowing from that which Section 7 was designed to prevent, *i.e.*, an actual lessening of competition or a monopoly. Numerous Section 7 cases have recognized this principle. See, for example:

> **Peterson v. Borden Co.**, 50 F. 2d 644, 646 (7th Cir. 1931) ("the right of action given to persons injured through the resultant tendency to substantial lessening of competition or creation of monopoly would include such injury only as such tendency to lessen competition or to create monopoly engendered");
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> **GAF Corp. v. Circle Floor Co., Inc.**, 463 F. 2d 752, 759 (2d Cir. 1972), *cert. dismissed* 413 U. S. 901 (1973) ("only a person whose competitive business position was harmed by the *anticompetitive* effects of

26. For the reasons stated at pp. 22-24, *supra*, the validity of the **Gottesman** conclusion is open to serious doubt. Its practical application is also questionable in view of the fact that, although **Gottesman** was decided seven years ago and a number of courts have expressed agreement with its conclusion, there has been only one case (the instant one) in which damages have been awarded solely for a Section 7 violation.

It would not be inconsistent with any statutory language or Congressional purpose if this Court were to reject the **Gottesman** conclusion and hold that all damage actions involving alleged violations of Section 7 must await the realities of completed violations of Section 1 or Section 2 and be brought under one or both of those sections. Such a holding would not interfere in any way with Government enforcement actions or private actions for injunctive relief. However, the circumstances of the instant case are such that the Court need not address itself to this point.

the alleged restraint of trade can maintain a treble damage action");

Reibert v. Atlantic Richfield Co., 471 F. 2d 727, 731 (10th Cir.), *cert. denied* 411 U. S. 938 (1973) ("The first element [of proximate cause], causal connection between violation and injury, is lacking because appellant cannot show that any antitrust violations directly injured him. He has suffered no direct injury as a result of the prohibited lessening of competition");

Rayco Mfg. Co. v. Dunn, 234 F. Supp. 593, 597 (N. D. Ill. 1964) ("the injury must result from the lessened competition or monopoly itself");

Pandola v. Texaco, Inc., 1975 Trade Cases ¶ 60,232 at p. 65,931 (C. D. Cal. 1975) ("a private litigant must demonstrate not only that its injury is causally related to the challenged acquisition, but also that its claimed injury results directly from the specific anticompetitive consequences proscribed by Section 7 itself, *i.e.*, 'lessened competition or monopoly itself' ").

Perhaps the best statement of the principle is contained in **Dole Valve Co. v. Perfection Bar Equipment, Inc.**, 311 F. Supp. 459, 462 (N. D. Ill. 1970), where the court said:

> "To recover damages under Section 7 of the Clayton Act, a complainant must be able to show that he 'suffered some special damage to his business as a direct and proximate result of the acquisition. • • • the injury must result from the lessened competition or monopoly itself.' . . . Proof that a competitor made sales after it was unlawfully acquired by another, even if the complainant competed for those sales, is not evidence that the sales were the 'direct and proximate result' of the unlawful acquisition. If such were the rule, corporations violating Section 7 would become insurers of the commercial success of their competitors. This is not the law."

In a most extreme extension of the concept that a Section 7 violation may give rise to a claim for money damages under Section 4, the Court of Appeals for the Third Circuit has held in the instant case that a competitor of the "acquired" company need **not** show injury resulting from a lessening of competition or monopoly. Rather, according to the Third Circuit, the competitor may recover damages under Section 4 merely by showing "injury in fact causally related to the violator's presence in the market, **whether or not** that injury flows from or results in an actual lessening of competition" (Pet. App. p. 19a). The Court of Appeals has based this holding on the unprecedented theory that "illegal presence which causes injury to the business or property of a competitor is compensable under § 4" (*Ibid.*).

No other decision has ever gone to such an extreme. To the contrary, the principles espoused by the Third Circuit are a direct contradiction of the views expressed by the Second Circuit in **Gottesman** and by other courts which have agreed with the **Gottesman** conclusion. The cases indicating that damage recovery may be had in appropriate circumstances for a Section 7 violation proceed on the premise that the harm for which there may be such recovery must be harm that flows from the lessened competition or monopoly that Section 7 was designed to prevent.[27] That premise is clearly correct. Section 4 of the

27. In addition to the cases cited in the text, see also **Zenith Vinyl Fabrics Corp. v. Ford Motor Co.**, 357 F. Supp. 133, 137 (E. D. Mich. 1973); **Peltier v. Humble Oil & Refining Co.**, 1973 Trade Cases ¶ 74,278 (D. Ore. 1972); **Kirihara v. Bendix Corp.**, 306 F. Supp. 72, 90-91 (D. Hawaii 1969); and **Smith-Victor Corp. v. Sylvania Electric Products Inc.**, 242 F. Supp. 315, 320 (N.D. Ill. 1965).

Clayton Act was not enacted for the purpose of enabling business enterprises to obtain windfall verdicts but to compensate those persons who can demonstrate that they have been injured in their business or property by reason of the lessening of competition forbidden by the antitrust laws. See, *e.g.*, **Conference of Studio Unions v. Loew's, Inc.**, 193 F. 2d 51, 55 (9th Cir. 1951), *cert. denied* 342 U. S. 919 (1952).

Whatever its potentiality may be, an acquisition that has not, in fact, resulted in a substantial lessening of competition or a monopoly generates no anticompetitive consequences.[28] In the instant case, for example, what occurred in each of the markets in question was a mere substitution of competitors. Instead of facing competition in the Poughkeepsie area from a 26-lane bowling center operated by a third party, Holiday Bowl-O-Mat faced competition from that same 26-lane center operated by petitioner. There was no lessening of competition and no monopoly. Neither petitioner's takeover and continued operation of Dutchess Lanes nor its presence in the market eliminated any actual or potential competitors from the marketplace. Competition in the marketplace did not lessen. And the "acquired" bowling center was not shown to have achieved any greater share of the bowling patronage in the market after the "acquisition" than it had obtained before. The same was true in the Pueblo market area, petitioner merely substituting as a competitor for the prior operator of Belmont Lanes, and in the Paramus market area, petitioner merely substituting for the prior

28. It must be recalled that respondents withdrew their claim that petitioner violated Section 1 of the Sherman Act (A1548), that the jury rendered a verdict in petitioner's favor on respondents' claim that petitioner violated Section 2 of the Sherman Act (A1543), and that respondents did not appeal from the judgment entered on that verdict. The case before this Court is based solely on the claimed Section 7 violations.

operators of Fair Lawn and Interstate in 1965 and for the prior operators of Ten-Pin and Lodi in 1969 and 1970 respectively. How can petitioner's mere presence in these markets give rise to compensable "damages" under the antitrust laws? Petitioner's "acquisitions" did not lessen competition. They preserved existing competition in each of these markets.

Respondents argue that the continued presence in the market of the "acquired" centers was unlawful and that respondents are entitled to recover as "damages" what they would have earned had that "unlawful presence" been eliminated. But respondents' "unlawful presence" theory will not hold water. The continued presence of the centers in the market place was not unlawful. Respondents were not entitled to have their competitors disappear. The purpose of the antitrust laws is to protect and foster competition, and this obviously presupposes the presence of competitors. It is not the presence of the "acquired" business which offends the law. "[I]t is competition, not competitors, which the Act protects," **Brown Shoe Co. v. United States,** 370 U. S. 294, 344 (1962), and it is completely at odds with the entire thesis of Section 7, which is designed to prevent a lessening of competition, to permit recovery under that statute for "damages" stemming solely from the preservation and continuation of competition. Respondents should not be permitted to use the antitrust laws to insulate themselves from competition itself.

This case should have been dismissed by the courts below.

II.

THE "FAILING COMPANY" DOCTRINE REQUIRES DISMISSAL OF A TREBLE-DAMAGE ACTION BASED ON ALLEGED VIOLATIONS OF SECTION 7 OF THE CLAYTON ACT WHERE THE PLAINTIFFS' ENTIRE THEORY OF INJURY AND DAMAGE IS BASED ON THE PREMISE THAT THE "ACQUIRED" BUSINESSES WOULD HAVE FAILED AND DISAPPEARED FROM THE MARKET HAD THE DEFENDANT NOT KEPT THEM ALIVE.

Section 7 of the Clayton Act was never intended to "impede . . . a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market." **Brown Shoe Co. v. United States,** 370 U. S. 294, 319 (1962). If an acquired company did not have the resources to be an effective competitor in the market, Section 7 is not violated by its acquisition. **United States v. General Dynamics Corp.,** 415 U. S. 486, 506-510 (1974).

Ever since **International Shoe Co. v. FTC,** 280 U. S. 291 (1930), it has been firmly established that an acquisition is immune from challenge under Section 7 where the financial condition and resources of the acquired company are so dire that it faces the grave possibility of business failure and there are no prospective purchasers other than the acquiring company. See **United States v. Diebold, Inc.,** 369 U. S. 654 (1962); **Citizen Publishing Co. v. United States,** 394 U. S. 131 (1969); **United States v. Greater Buffalo Press, Inc.,** 402 U. S. 549 (1971). In adopting this "failing company" doctrine, the Congress[29]

29. Both Houses of Congress expressed an intention to preserve the failing company doctrine when Section 7 of the Clayton Act was amended in 1950. See **Brown Shoe Co. v. United States,** 370 U. S. at 331; **United States v. General Dynamics Corp.,** 415 U. S. at 506.

and this Court considered it more important to preserve competition by assuring the continued existence of a competitive entity than to eliminate the possible anticompetitive effects of the acquisition.

> "The failing-company defense presupposes that the effect on competition and the 'loss to [the company's] stockholders and injury to the communities where its plants were operated,' *International Shoe, supra,* at 302, will be less if a company continues to exist even as a party to a merger than if it disappears entirely from the market. It is, in a sense, a 'lesser of two evils' approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business." **United States v. General Dynamics Corp.,** 415 U. S. at 507.

In dealing with the "failing company" doctrine as a defense, this Court has stated that "the burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it." **Citizen Publishing Co. v. United States,** 394 U. S. at 138-139. But surely this rule as to the burden of proof has no application where a plaintiff seeks to recover on a principle of injury and damage which is based in its entirety on the premise that, were it not for the "acquisition," the "acquired" company would have failed and gone out of business.

Respondents' entire case is premised on the assumption that, had petitioner not taken them over for operation, the bowling centers whose continued operation is asserted to be the cause of respondents' claimed "damages" would have gone out of business and disappeared from the marketplace (A366-A367, A377-A404, A511-A513, A565-A566, A571, A586, A852-A855).[30] The Court of Appeals specifically recognized this:

> ". . . It is . . . argued that Brunswick's presence in these markets was illegal and that plaintiffs suffered damages . . . because in the absence of that illegal presence the acquired centers would have gone out of business thus effectively transferring customers to Treadway's centers" (Pet. App. pp. 9a-10a).
>
> "To meet this burden [of proving damages] the only evidence offered by plaintiffs was the expert opinions of several witnesses as to what profits the Treadway bowling centers would have made if Brunswick, instead of acquiring the centers, had permitted them to close" (Pet. App. p. 24a).

Thus, it was a necessary element of respondents' theory of injury and damage that the finder of fact first conclude that the bowling centers in question would have failed and gone out of business had petitioner not taken the places of the former operators of those centers. Indeed, in their own petition for certiorari, respondents insisted that the record in this case establishes, beyond any possible cavil, that those centers would, in fact, have gone

30. As one of respondents' witnesses graphically put it, "the assumption is that these centers would have fallen of their own economic weight if Brunswick didn't prop them up" (A853). See also A377-A379, A511, A571, A586 and A855.

out of business.[31] Respondents have made this assertion in order to nail down the factual premise for their "damage" claim, but in so doing respondents effectively have conceded the operative facts of the "failing company" doctrine, which precludes a finding that the "acquisitions" in question violated Section 7.

If the bowling centers in question would have failed and gone out of business but for petitioner keeping them open and viable as competitors,[32] they were "failing companies" whose "acquisition" could not have violated Section 7. Contrariwise, if the centers would not have gone out of business, the necessary premise for respondents' only claims of injury and damage is missing. In either event, respondents' case must fail.

The Third Circuit, however, failed to deal with this inescapable conclusion. It held that the burden was on respondents to prove, as the foundation of their damage claims, that but for petitioner's having continued their operation the centers taken over by petitioner would have failed and gone out of business (Pet. App. pp. 25a-27a). The Court further held that respondents had not proved this essential fact (Pet. App. pp. 25a-27a). Instead of entering judgment for petitioner, the Court of Appeals remanded the case for a new trial, giving respondents another chance to prove their case.

31. Petition for certiorari in **Treadway Companies, Inc. et al. v. Brunswick Corporation** (October Term 1975, No. 75-770), pp. 13-14.

32. The undisputed evidence was that petitioner did not repossess the equipment of a center unless the operator of the center was hopelessly insolvent (A1367-A1370, A1431). As the Court of Appeals pointed out, petitioner would then attempt to sell the repossessed equipment "in place to third parties. If no sale could be effected Brunswick would then consider operating the failing centers itself if there appeared to be any reasonable prospect that a positive cash flow would result" (Pet. App. p. 8a).

Additionally, the Court of Appeals held that in a new trial the burden would be on petitioner to prove that the centers which it took over and operated were "failing companies" (Pet. App. pp. 26a-27a). What the Court of Appeals apparently did not consider was that, if respondents were to succeed in proving that the centers in question would have failed and gone out of business, such proof would relieve petitioner of the burden of proving the same thing.

The insistence by the Court of Appeals that there be a new trial in this case appears to stem from that court's unreasoning obedience to this Court's pronouncement, in an altogether different context, in the **Citizen Publishing** case, *supra*, that "the burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it." But the Court's statement in **Citizen Publishing** was not addressed to circumstances similar to those present in the instant case, and the Court clearly did not have this type of case in mind when it made the statement. We submit that the remark in the **Citizen Publishing** case should not be used to defeat the fundamental and well-recognized principles that (1) the party who has the burden of proof on an issue is relieved of that burden where his adversary supplies the necessary proof [33] and (2) that a litigant should not be permitted to maintain mutually contradictory positions in

33. See, *e.g.*, **Bradford Audio Corp. v. Pious**, 392 F. 2d 67, 73 (2d Cir. 1968) ("The appellee may avail himself of the appellant's proof"); **Van Sant v. American Express Co.**, 169 F. 2d 355, 365 (3d Cir. 1948). ("[A] party may be relieved of the burden imposed upon him by the fact that the necessary proof is introduced by his adversary"); **Aetna Insurance Co. v. Taylor**, 86 F. 2d 225, 227 (5th Cir. 1936) ("The burden of proof is satisfied by actual proof of the facts of which proof is necessary, regardless of which party introduces the evidence"). See also **Carr v. National Discount Corp.**, 172 F. 2d 899, 903 (6th Cir. 1949).

the same lawsuit.[34] To hold otherwise and to permit respondents to blow hot and cold on the same question of fact is offensive to basic concepts of fairness and forthrightness. Moreover, permitting respondents to prevail here would subject to treble damages a party which has prevented a failing business from disappearing from the market, discourage other such competition-preserving rescues, and thus defeat the salutary purpose of the "failing company" doctrine.

It should be noted, moreover, that the fact that the rescued bowling centers in this case were "failing companies" is established on the present record both by proof and by admission. Interstate Lanes and Fair Lawn Lanes were sold as assets of a bankrupt parent corporation. Dutchess Lanes, Belmont Lanes and Ten-Pin-On-The-Mall were centers from which petitioner had repossessed the lanes and pinsetters due to defaults in equipment payments, and the evidence is that petitioner never repossessed equipment unless the debtor was hopelessly insolvent.

Apart from anything else, however, the fact that respondents introduced evidence of "damages" which ad-

34. See *e.g.*, **Scarano v. Central R. Co.**, 203 F. 2d 510, 512-513 (3d Cir. 1973) (It "is sometimes said to be a general rule that 'a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits' "); **Diaz v. Southeastern Drilling Co.**, 324 F. Supp. 1, 7 (N. D. Tex. 1969) ("No rule is better settled than the one that: 'A party who assumes and successfully maintains a certain position in a judicial proceeding cannot thereafter adopt an inconsistent position if doing so would result in prejudice to his adversary' "). See also **Davis v. Wakelee**, 156 U. S. 680, 689 (1895); **Jamison v. Garrett**, 205 F. 2d 15, 17 (D. C. Cir. 1953); **Lummus Co. v. Commonwealth Oil Refining Co.**, 280 F. 2d 915, 928 (1st Cir. 1960); **Roth v. McAllister Bros., Inc.**, 316 F. 2d 143, 145 (2d Cir. 1963). And see **Holcomb v. Aetna Life Insurance Co.**, 255 F. 2d 577 (10th Cir. 1958); **Jones v. Central of Georgia Ry. Co.**, 331 F. 2d 649 (5th Cir. 1964).

mittedly was premised on the fact that the bowling centers taken over and operated by petitioner otherwise would have failed and disappeared should be given the force of a judicial admission and should be sufficient, in the absence of any countervailing evidence, to invoke the "failing company" doctrine and to compel the entry of judgment for petitioner.

The courts below should have ordered the entry of a judgment of dismissal as a matter of law.

CONCLUSION.

For the reasons set forth above, the judgment of the Court of Appeals for the Third Circuit should be reversed insofar as it directs a new trial in this matter. The case should be returned to the United States District Court for the District of New Jersey with directions to dismiss the action.

Respectfully submitted,

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